BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 14, 1997
Case No: 96-INA-00360

In the Matter of:

BENGAL PROTEA LIMITED
Employer

On Behalf of:

AVI KOREN.
Alien

Appearance: Marsha Edelman, Esq.
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Avi Koren ("Alien") filed by Employer Bengal Protea Limited ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, Atlanta, Georgia, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment

service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On March 15, 1994, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Import Manager in its Diamond Imports and sales company.

The duties of the job offered were described as follows:

"Directs imports of diamonds from Israel for resale to wholesalers and retail stores in the U.S. Appraise diamonds in Israel and negotiate purchase from Israel supplier. Oversee transportation of diamonds from Israel including customs documents, insurance and shipping paperwork. Responsible for inventory control."

No education and 3 years experience in the job were required or the related occupation of sales manager. Special requirements were: Fluency in Hebrew. Must travel to Israel 2-3 times per year. Wages were $21,800.00 per year. The applicant would supervise 1 employee and report to the President. (AF-99-103a)

On June 12, 1995, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(2)(I) in that the Hebrew Language requirement along with travel out of country to Israel may be unduly restrictive. The CO required documentation by employer that the requirements are a business necessity such as correspondence, invoices, price lists, telephone bills, etc. Secondly, Employer may have violated Section 656.21(b)(5) "..because the duties of this job are tailored to the education, training and experience listed by the alien on the 750-B form..The employer's job description as described in Item 13 of the 750-A form for the position of Wholesaler II/Import Manager, is described the same as the job duties that are now being performed by the alien as Sales Manager for the Employer." (AF-76-82)

Employer, July 18, 1995, forwarded its rebuttal, stating that the business conducted had substantial contacts with Israel and that Hebrew was a business necessity. Substantial documentation was attached. In connection with the job experience issue, Employer stated that the proposed duties of the import manager were: direct imports of diamonds from Israel; appraise diamonds in Israel; negotiate the purchase of diamonds from Israel suppliers; oversee the transportation of diamonds from Israel to the U.S.; maintain inventory control. The duties alien currently does as sales manager are: develop sales strategy; develop

marketing strategies; negotiate sales to purchasers in the U.S.; coordinate diamond purchases from Israel. The President of Employer, Igal Bengal, stated:"I am the person within our organization who is responsible for carrying out the purchasing negotiations and importing of diamonds from Israel. At the present time we have three full time employees. Myself (as president), Avi Koren (sales manager) and our office manager/secretary. Due to our expansion plans and increased sales I have decided to reorganize the corporation to create a new import manager position because I can no longer carry out all of my administrative duties and those of an import manager. There will be four distinct employment positions within our U.S. corporation once this reorganization is completed. Each of the employees will have separate and distinct job duties. The sales manager position will continue to be separate and distinct from the import manager position." (AF-6-75)

On September 25, 1995, the CO issued a Final Determination denying certification since Employer had failed to document that the job opportunity was different from the experience alien gained with Employer as a sales manager. "The job duties are basically the same, and the alien gained the qualifying experience with the employer, which cannot be used. The alien is not qualified for the position." (AF-5,5(a))

On October 17, 1995, Employer filed a request for reconsideration of the Final Determination, which was denied. On March 21, 1996, Employer requested review by this Board (AF-1-4)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). An employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for employer in the same job. Central Harlem Group, Inc., 89-INA-284 (May 14, 1991). In order for an Employer to successfully argue that the alien gained his qualifying experience in a "lesser" job it must be demonstrated that the "lesser" job is sufficiently dissimilar to the job offered. Brent-Wood Products, Inc., 88-INA-259 (Feb. 28, 1989)(en banc). In Delitizer Corp. Of Newton, 88-INA-482 (May 9, 1990)(en banc) some of the criteria for determining whether jobs are "sufficiently dissimilar" were set out as follows: relative job duties, supervisory responsibilities and job requirements of the positions; positions within the employer's hierarchy; employer's prior employment practices; whether and by whom the "higher" position has been filled and whether it has been newly created; respective salaries. Employer does not meet any of these criteria. The fact remains that the "new" job is basically a reconfiguration of the old job with a bit of speculation as to future business course thrown in. Therefore, we must affirm the

CO’s final determination for the reasons given.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

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